Office-Supreme Court, U.S.
FILED
JUN 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1704

In the Supreme Court of the United States

OCTOBER TERM, 1980

ST. LOUIS COMPREHENSIVE NEIGHBORHOOD HEALTH CENTER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner has sufficient control over its labor relations to enable it to bargain effectively with the union representing its employees, so that the Board properly asserted jurisdiction over petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-44 to A-59) is reported at 633 F. 2d 1268. The decision and order of the National Labor Relations Board (Pet. App. A-39 to A-43) are reported at 244 N.L.R.B. No. 115. The Decision and Direction of Election of the Regional Director is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1980 (Pet. App. A-44). A timely petition for rehearing was denied on December 31, 1980 (Pet. 2). The petition for a writ of certiorari was filed on March 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

> Section 8, 29 U.S.C. 158.
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a).

STATEMENT

1. Petitioner ("the Center") is a non-profit Missouri corporation engaged in providing health services for residents within St. Louis County (A. 2; Tr. R. 12).[1] The Center receives substantial funding from the Department of Health, Education and Welfare (HEW)[2] pursuant to a provision of the Public Health Service Act, 42 U.S.C. (& Supp. III) 254c. The Center also receives funds from other sources such as Medicaid and Medicare programs, and payments from patients, and private insurance companies.

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[1] "A." refers to the appendix to the briefs in the court of appeals. "Tr. R." and "Tr. C." refer to the transcript of the hearings in the representation and unfair labor practice cases respectively. "Bd. Exh." and "Emp. Exh." refer to the Board's and the Center's exhibits introduced at the representation case hearing. "GCX" and "RX" refer to the General Counsel's and the Center's exhibits introduced at the unfair labor practice hearing.

[2] The pertinent programs are now administered by the Department of Health and Human Services. Because petitioner and the decisions below refer to HEW, however, we use that name in this brief.

From the incorporation of the Center in 1969 through August 1977, HEW grant money for the Center was awarded to the Human Development Corporation (HDC)—a non-profit corporation organized for the purpose of operating anti-poverty programs in the St. Louis Metropolitan area—and HDC by contract delegated to the Center the operation of the Center's program (A. 2, 3; Bd. Exh. 3). In February 1977, the Center submitted an application to HEW for direct funding. Beginning in September 1977, the grant was awarded directly to the Center and HDC was no longer involved with the Center. (Pet. App. A-15 to A-16, A-26; Tr. C. 132; Tr. R. 82; RX2.)

To apply for funds, the Center submits a proposed budget detailing all projected expenditures for the one-year grant period and indicating for each expenditure what portion the Center requests HEW to cover and what portion the Center will provide from non-HEW sources (Tr. C. 133; RX2). Based on this submission, as well as a narrative plan of the Center's program, HEW determines the amount of the grant and then approves a projected budget that details the allocation of the HEW funds actually provided and also shows how anticipated non-HEW funds will be distributed.

The Center is governed by a board of directors which, according to applicable HEW regulations,[3] is responsible for establishing personnel policies and procedures, including selection and dismissal procedures, salary and benefit scales, employee grievance procedures and equal opportunity practices (Tr. C. 196, RX1). The board of directors selects a project director who, along with an administrator, is responsible for the day-to-day management of the Center (Tr. R. 128, 144, 155). The Center independently hires,

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[3] 42 C.F.R. 51c.304. The regulations require that a majority of the board be individuals served by the Center; none are required to be elected officials (A. 2).

discharges and promotes its employees (A. 4; Tr. R. 83, 113; Emp. Exh. 13 § 2.13). The Center's board of directors independently promulgated and adopted a comprehensive personnel manual setting out the Center's policies with respect to hours of work, transfers, holidays, vacations, grievance procedures, disciplinary actions and salary administration (Tr. R. 122-123; Emp. Exh. 13). Under the Center's policies, disciplinary matters and employee grievances are handled initially by the immediate supervisor and, if not resolved at that level, may ultimately be brought to the project director, who has final authority to resolve such matters (Tr. R. 84, 114; Emp. Exh. 13). The Center has sole responsibility for making work assignments, directing employees in the performance of their work, authorizing overtime and scheduling employee vacations and daily lunch and break periods (A. 4; Tr. R. 85-86, 124-126). Finally, the Center has independently established a fringe benefit program providing for sick leave, maternity leave, absence without pay, a group medical plan, group medical insurance and a retirement plan (Tr. R. 108; Emp. Exh. 13 § 2.14).

In March 1977, the Service and Hospital Employees Union, Local Union No. 50 ("the Union") petitioned the Board for a representation election in a unit of the Center's employees (A. II). The Center opposed the petition, urging that the Board should not assert jurisdiction because of the Center's relationship to HDC and HEW. After an evidentiary hearing on the petition, the Board's Regional Director found that neither the Center's relationship to HDC nor its relationship to HEW precluded the Board from exercising jurisdiction over the Center (A. 5). The Board denied the Center's request for review of the Regional Director's decision and the ensuing representation election was won by the Union, which was then certified by the Board as the unit employees' collective bargaining agent (Pet. App. A-8).

Following certification, the Union on successive dates between July and November 1977, sought to meet with Center representatives over the discharge of Bill Franklin, a Center employee, and to negotiate a collective bargaining agreement (Pet. App. A-10 to A-18). The Union also requested certain information pertaining to the employees' wages and terms and conditions of employment (*id.* at A-12). The Center refused to meet with the Union concerning the employee discharge and failed to provide the requested information. The Center also refused to meet to negotiate a collective bargaining agreement, stating in part that it did not have the authority to make such agreements (*id.* at A-10). At the end of September, the Center submitted a policy statement concerning collective bargaining to HEW and requested a position statement from HEW (*id.* at A-16).

In November, following another request by the Union, the Center stated that its representatives would meet with the Union but would not discuss substantive issues until it received a response from HEW to the Center's policy statement (Pet. App. A-18 to A-19). At the meeting on December 7, the Union presented contract proposals and requested discussion. The Center representatives stated that further discussion would have to await HEW's response to the Center's policy statement and that the Center would contact the Union after receiving HEW's response (*id.* at A-19 to A-20). HEW responded as follows to the Center's statement (*id.* at A-48 to A-49):

> We have reviewed the documents you submitted relative to representation of your employees by a Union. * * * [W]e have had very limited experience in the area of collective bargaining relative to project personnel. Accordingly, we can offer only limited guidance. We would remind you, however, that once the Public Health Service awards its allotted funds to its various

> grantees, the total amount awarded generally remains constant. Only rarely do supplemental funds become available. Therefore, in the event of a future agreement that would require an increase in the funding level, you may find it necessary to develop an additional source of funds.

The Center did not thereafter contact the Union to schedule additional meetings and the Union was unsuccessful in its attempts to arrange meetings with the Center (Pet. App. A-20 to A-21, A-49).

2. The administrative law judge, whose decision was adopted by the Board,[4] found that the Center was able to engage in meaningful collective bargaining with the Union (Pet. App. A-31). The judge noted that, while the Center claimed that it would be required to submit any collective agreement to HEW for approval, "[i]n the one communication from HEW that is in the record regarding labor agreements, HEW states only that if the [Center] enters into a collective bargaining agreement it may have to find supplemental sources of funding in addition to the HEW grant" (Pet. App. A-28). The judge also noted (Pet. App. A-32) that applicable HEW regulations give the Center " 'specific responsibility for: . . . (ii) Establishing personnel policies and procedures, including selection and dismissal procedures, salary and benefit scales, employee grievance procedures and equal opportunity practices.' "

Accordingly, the Board concluded that the Center violated Section 8(a)(1) and (5) of the Act by refusing to meet

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[4]The Board noted (Pet. App. A-40 to A-41 n.1) that at the time of the representation hearing, the Center was indirectly funded by HEW through HDC, but that by the time of the unfair labor practice hearing it had become a direct grantee of HEW. The Board, noting that the judge had allowed the Center to proffer evidence regarding any relevant changes occurring as a result of this occurrence, expressly based its decision on the totality of the evidence adduced (*id.* at A-40 to A-41 n.1).

with the Union to discuss the discharge of employee Franklin or for bargaining negotiations, and by refusing to supply information relevant for bargaining purposes (Pet. App. A-32 to A-33, A-40 to A-41). It entered an appropriate order (Pet. App. A-35 to A-38, A-42 to A-43).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-58 to A-59). The court agreed with the Board that "the record does not disclose that the Center's relationship with HEW precludes it from effectively bargaining with the Union" (*id.* at A-56). The court noted that the Center's board of directors "has primary responsibility for personnel policies, wages and other conditions of employment" (*id.* at A-54). The court rejected the Center's reliance upon a provision in the HEW grant stating that " 'all proposed contracts must be submitted to [HEW] for approval *prior* to entering into the agreement' " (*id.* at A-55). Noting that the extent to which HEW may veto a collective bargaining agreement is not clear, the court stated that "the record demonstrates that HEW has no objection to a collective bargaining agreement * * *" (*id.* at A-56). The court also noted (*ibid.*) that additional federal regulations applicable to the Center's HEW grant indicate that costs of compensation set by labor-management agreements are allowable under the grant so long as compensation does not exceed amounts paid for similar non-government work under comparable circumstances (*ibid.*).[5]

ARGUMENT

1. Section 2(2) of the Act, 29 U.S.C. 152(2), excludes the "United States or any wholly owned Government corporation * * * or any State or political subdivision thereof" from the definition of "employer," but the Act does not

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[5]Those regulations are 45 C.F.R. 74.174(a) and 45 C.F.R. Part 74 app. F, Section G-6(f), made applicable to the HEW grants through 42 C.F.R. 51c.113.

exclude from its coverage private employers with monetary or contractual relationships with federal or state governments. Thus, the decision whether to assert jurisdiction over such private employers is left to the Board's discretion. In determining whether the assertion of jurisdiction over an employer with ties to an exempt governmental entity will effectuate the purposes of the Act, the Board, with court approval, focuses on whether the non-exempt employer has sufficient control over labor relations matters to enable it to bargain with the labor organization representing its employees. *National Transportation Service, Inc.*, 240 N.L.R.B. 565 (1979). See also *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398, 405-406, 413-414 (1947) (Board has jurisdiction over militarized guards despite federal government's reserved right to veto private employer's hiring and firing decisions); *Herbert Harvey, Inc.* v. *NLRB*, 424 F. 2d 770, 774-775 (D.C. Cir. 1969); *NLRB* v. *Pope Maintenance Corp.*, 573 F. 2d 898, 904 (5th Cir. 1978); *NLRB* v. *Howard Johnson Co.*, 317 F. 2d 1, 2-3 (3d Cir.), cert. denied, 375 U.S. 920 (1963).

The Center does not dispute this principle. Rather, it asserts that HEW regulations and grant conditions preclude it from having sufficient control over its labor relations to engage in meaningful collective bargaining. This issue, which turns on the particular facts of this case, does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the record fully supports the Board's finding, upheld by the court of appeals, that the regulations and conditions applicable to the Center as an HEW grantee do not materially affect the Center's labor relations and that the Center exercises broad authority with respect to its labor relations. There is no evidence that HEW controls

personnel and labor relations matters, which are expressly made the responsibility of the Center's board of directors.[6]

The Center's basic contention is that it is unable to engage in meaningful bargaining because it would have to secure "prior approval" (Pet. 26) of HEW before it could enter into a collective bargaining agreement. However, as the court of appeals observed in rejecting this argument (Pet. App. A-55 to A-56), "[t]he extent to which HEW may veto any contract, including a collective bargaining agreement is not clear." And even assuming that HEW possessed such broad power, the evidence indicates that it chose not to exercise it with respect to labor agreements. It expressed no objection to the Center's entering into such an agreement and advised the Center only that, because "supplemental" Public Health Service grants were "rarely" available, any increased expenses resulting from the requirements of a collective bargaining agreement would probably have to be met through funding from sources other than HEW (Pet. App. A-48 to A-49). Consequently, the only barrier to collective bargaining for increased salary levels is the Center's ability to develop the additional funding. In this regard, the Center is no different from any other employer which faces economic limits on the benefits it can afford to pay.

Lutheran Welfare Services of Illinois v. *NLRB*, 607 F. 2d 777 (7th Cir. 1979), upon which the Center relies (Pet.

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[6]The Center asserts (Pet. 8, 18) that "HEW has mandated wage plans" and has prohibited the Center from granting raises to the employees. However, the record shows not that HEW mandated a wage plan but merely that, in one instance, HEW requested that the Center develop a new wage plan (Tr. 115). Similarly, the record shows that on one occasion, before the Center became a direct grantee, HEW imposed a condition that no raises be granted during a 60-day period during which the Center and HDC were to submit a revised budget to HEW (Emp. Exh. 10, Tr. R. 33-34). These two limited actions do not significantly detract from the Center's extensive authority over its labor relations and personnel policies.

23), is distinguishable from this case. As the court of appeals noted (Pet. App. A-51 to A-54), the degree of control exercised by the exempt agency over the labor relations of the employer in *Lutheran* was far greater than that shown here. In *Lutheran*, the court found (607 F. 2d at 778) that a local agency, Model Cities, exercised substantial control over the labor relations of the day care center employer: the employees were classified and their salaries set in accordance with Model Cities' policy; Model Cities' approval was required before the employer could hire or promote employees; the employer was required to submit personnel evaluation reports to Model Cities; and the day care center directors were supervised by Model Cities. No such indicia of control by HEW are present in this case.

2. The Center's second contention (Pet. 25-31), that it dealt with the Union in good faith, subject to the limitations on its ability to bargain imposed by its relationship to HEW, is merely a restatement of its initial contention that it lacked the requisite control over its labor relations to engage in collective bargaining negotiations. In any event, the court of appeals found that the Center did not deal in good faith with the Union. Rather, the court found (Pet. App. A-57 to A-58):

> [The Center] failed to meet with the Union and to attempt a good faith bargaining relationship. If, in fact, its refusal to reach a bargaining agreement on a specific condition demanded by the Union was based upon its inability to obtain HEW approval or funding, we would be faced with a specific context in which to view HEW's role in supervising the Center. Until such an impasse can be shown there exists substantial evidence on this record that the Center has been guilty of much foot dragging and bad faith delays in failing to meet and bargain with the Union. [Footnote omitted.]

This factual finding raises no issue appropriate for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

DOJ-1981-06